In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 638

FLORIDA EAST COAST RAILWAY COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

No. 639

CITY OF TAMPA, FLORIDA, APPELLANT

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, ET AL.

No. 641

SOUTHERN RAILWAY SYSTEM, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

MEMORANDUM FOR THE UNITED STATES

STATEMENT

On July 22, 1960, Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Com-

237-563—66

pany—two of the three major railroads in the southeastern United States[1]—applied to the Interstate Commerce Commission, pursuant to Section 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. 5(2)(b), for authorization to merge. After extended proceedings, the Commission, on December 2, 1963, approved the application, finding it to be "consistent with the public interest," the statutory standard. 320 I.C.C. 122.

An action to set aside the Commission's order was brought in a three-judge federal district court in Florida. Controversy focused on the adequacy of the Commission's findings with respect to the alleged adverse competitive effects of the merger, the United States (among other parties) arguing that they were inadequate. The district court, upon its initial review, found it unnecessary to consider the particularized challenges to the Commission's findings on competition; it held that, in any event, the order must be set aside because the Commission had failed "to decide whether or not section 7 of the Clayton Act would be violated by the proposed merger" and to make the market analysis required in a Section 7 case. 242 F. Supp. 14, 20.

The Commission and the merger applicants appealed to this Court, which summarily reversed the judgment of the district court. *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (*per curiam*). The Court held that the Commission was not required to make Section 7 findings, although it was obliged

[1] The third is Southern Railway Company.

to "estimate the scope and appraise the effects of the curtailment of competition" resulting from the merger, as the Court had held in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87, and *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 186. The Court declined to consider the adequacy of the findings the Commission had made on competition. Deeming that a matter for the district court in the first instance, it remanded the case "for a full review of the administrative order and findings pursuant to the standards enunciated by this Court."[2]

On remand, the United States again urged the inadequacy of the Commission's findings. The district court, however, upheld the findings and order.[3] These appeals followed.[4]

DISCUSSION

1. A merger duly approved by the Interstate Commerce Commission cannot be challenged under the antitrust laws. 49 U.S.C. 5(11). But that is not to

[2] The course adopted by the Court had been urged by the United States. We had stated that on remand we would renew our contention that the Commission's findings were inadequate. Memorandum for the United States, Nos. 425 and 555, O.T. 1965, pp. 4–5.

[3] The opinion of the district court is not yet reported. It is printed as Appendix A to the Jurisdictional Statement of Florida East Coast Railway Company.

[4] We do not here respond to the appeal of the Railway Labor Executives' Association (No. 640, this Term), challenging the labor-protective conditions imposed by the Commission, in view of the anticipated settlement of that phase of the case. See the application of appellees Seaboard Air Line *et al.*, filed November 3, 1966, for an extension of time within which to move to affirm in No. 640.

say that the Commission is free to ignore competition—the policy which underlies those laws—in deciding whether a merger should be approved as consistent with the public interest. The Commission's guide in determining where the public interest lies is whether the proposal will promote "adequate, economical, and efficient service" and "sound economic conditions in transportation" (National Transportation Policy, 49 U.S.C. preceding § 1), and competition is an important method whereby efficiency is spurred and sound economic conditions fostered. Therefore, the competitive impact of a merger is a factor that the Commission must consider carefully, and evaluate thoroughly (*McLean, Minneapolis, supra*).

Of course, having done so, the Commission may in the particular case conclude that any adverse competitive effects the merger may have are outweighed by other factors and that, on balance, the merger is in the public interest. We do not quarrel with the balancing process; the statute plainly requires it. But it is no less plain that the Commission cannot perform its balancing function in a rational and sound manner without making a reasonable effort to determine the scope and magnitude of the merger's adverse competitive effects. And while the Commission need not follow the identical analysis, or make the same findings, as would be required in an antitrust case (*Seaboard Air Line R. Co., supra*), it is surely the proper office of judicial review to insist that the Commission's opinion clearly show that it carefully considered the competitive dimension.

2. Tested by this standard, the findings with respect to competition which the Commission made in approving the merger of Atlantic and Seaboard were, we believe, deficient. We note here what we regard as the most serious deficiencies.

First. The Commission seemingly assumed that the only adverse effects of the merger would be felt in western and central Florida, where Atlantic and Seaboard are the only railroads. It failed even to advert to the possibility that the merger might injure competition throughout the Southeast by reducing the number of major roads from three to two. Competition is generally more vigorous and effective where there are many competitors; it is especially likely to be weakened when, in a market already dominated by a small number of firms, one of the majors is eliminated as an independent competitive factor.

We recognize that the Commission was not completely indifferent to the possible competitive impact of the merger throughout the Southeast. Its opinion contains repeated findings that, outside of Florida, rail competition would remain vigorous and effective after the merger (320 I.C.C. at 164, 166, 211), and it specifically found that, by virtue of certain conditions designed to increase Southern Railway's access to the eastern Florida market, the merger would "create more balanced competition among the several rail carriers in the southeastern seaboard area" (*id.* at 184) and produce "an increase rather than decrease in intramodal rail competition" (*id.* at 188). But the Commission's opinion does not consider the possibility

that, while Southern would doubtless continue to compete vigorously against the merged roads, a reduction in the number of major competing railroad systems in the Southeast might nonetheless have a serious adverse impact on rail competition generally in the region. The district court did not mention, let alone condone, this deficiency in the Commission's findings.

Second. The Commission, conceding that the merger would produce a rail monopoly in portions of Florida, discounted the economic impact of the monopoly by reference to the vigor of competition from other modes of transportation—trucks and barges. But it failed to determine the actual extent to which competing modes provide an adequate alternative to Florida shippers who now use rail service. Doubtless the Commission was aware that, for the foreseeable future, certain kinds of shipments would continue to move largely if not exclusively by rail; it stated that competition among railroads was still a value worth preserving (320 I.C.C. at 210). Yet, the Commission's opinion, it seems to us, too readily assumes that the adverse effects of the Florida monopoly would be largely offset by the strength of the competition from other modes (*id.* at 166, 211–212). We believe that a more probing inquiry by the Commission would have revealed that the railroads continue to enjoy substantial monopoly power in the long-haul transportation of many important commodities produced in the affected area, and we point out that this was the view of the district court as well (F.E.C. J.S., App. A, p. 20a). But, however

that may be, surely the Commission was not entitled to *presume* the efficacy of inter-modal competition. It was required to analyze with some particularity the extent to which the affected Florida shippers would, in fact, be shielded from the injurious effects of a rail monopoly by the availability of service by trucks or barges. We find no such analysis in its opinion.

Third. In balancing the adverse competitive effects of the merger in Florida against its overall benefits, the Commission made, we think, insufficient effort to measure the magnitude of those effects. It did not attempt to determine how many shippers would be denied competitive rail service. Nor did it attempt to assess the hardship to them of such denial—a deficiency obviously related to the Commission's apparent assumption that shippers dissatisfied with the service of a rail monopolist have ready recourse to competing non-rail carriers. The Commission considered the number of *localities* that would be deprived of competitive rail service as a result of the merger (320 I.C.C. at 164–165), but not the character of the shipments originating in those localities or the dependence of the shippers in those localities on rail service. It satisfied itself that only one city of more than 200,000 population (Tampa) would be deprived of competitive rail service (*ibid.*), but it ignored the possibility that smaller cities might be equally or more important sources of rail shipments (especially of minerals, forest and farm products, which typically do not originate in large cities); nor did it consider the probable impact of single-rail service on Tampa itself.

3. In summary, judging the Commission by what it said, as we must, we believe that it made insufficient attempt to determine the substantiality of the merger's adverse competitive effects. More considered analysis, we think, was necessary before the Commission could meaningfully weigh those effects against the merger's benefits. We agree, of course, that had the Commission made the proper analysis and found—as we think the record shows—that the adverse competitive effects of the Atlantic-Seaboard merger would indeed be great, it might still have approved the merger. But it would have done so with its eyes open. Instead, the Commission weighed against the benefits of the merger a determination that "such reduction in competition as will result from the merger will have no appreciably injurious effect upon shippers and communities" (320 I.C.C. at 167)—a view, we believe, not adequately supported in the Commission's opinion. One cannot say what the Commission's judgment would have been had it more fully confronted and analyzed the crucial issues of competition in this case.

It may be questioned whether a dispute as to the adequacy of an agency's analysis of one of the public-interest factors that it must consider provides a sufficient basis for invoking plenary review by this Court, especially where, as in this case, the initial reviewing court, in a lengthy and considered opinion, sustained the agency's order. But there are special circumstances here. At issue is a major merger which will remake the railroad map of the entire southeastern United States. And it is but one of a large wave of

railroad mergers, constituting a movement nationwide in scope and likely to have profound and permanent effects upon the transportation industry of this country. All of these mergers must be submitted to the Commission for approval, and, once approved, they are, of course, immune from antitrust challenge. In the circumstances, insistence upon the adequacy of the Commission's analysis of competition is surely not hypertechnical.

There is, in short, a clear need for early delineation of the standard of care to which the Commission shall be held in evaluating the competitive dimension of railroad mergers, and this consideration persuades us that the case—despite its obvious difficulties—is one which would warrant plenary consideration by this Court.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

RICHARD A. POSNER,
Assistant to the Solicitor General.

EDWIN M. ZIMMERMAN,
LIONEL KESTENBAUM,
THOMAS R. ASHER,
Attorneys.

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